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ABSTRACT

Following the Kentucky Supreme Court's 1989 ruling that declared the state's common school system unconstitutional, lawyers and educators sued the state legislature for failure to provide an efficient school system. The role of litigation and lawyers in Kentucky education reform is examined in this paper. Part 1 describes how a group of lawyers and educators collaborated to win the case. Part 2 assesses the role of nonlegal factors, such as publicity and public support, political connections and status, and public perception of the lawsuit. The multiple roles played by lawyers in the process are examined in the third part. A conclusion is that the litigation outcome was a result of legal, social, and political forces meeting at the right time in history. Lawyers played crucial roles in enhancing legitimacy, providing effective navigation through the courts, drafting legislation, and monitoring the Education Reform Act of 1990. (308 endnotes) (LMI)

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ACORNS IN A MOUNTAIN POOL

THE ROLE OF LITIGATION, LAW AND LAWYERS IN KENTUCKY EDUCATION REFORM

Ronald G. Dove, Jr.

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The Author

Ronald G. Dove has his B.A. from Milligan College, 1987 and a J.D. from Harvard University, 1991. This case study is dedicated to his grandfather, Dr. Donald G. Sahli (1915-1981), who spent much of his life striving to improve public education in Tennessee. It was made possible in part by the financial support of the Andrew W. Mellon Foundation.

Preface

The Prichard Committee is pleased to publish this historical study of events leading up to the landmark decision of the Kentucky Supreme Court in 1989 and subsequent legislative action. We are often asked to explain the circumstances surrounding the creation, passage and funding of the Kentucky Education Reform Act of 1990. Ronald G. Dove researched this question thoroughly and thoughtfully for a third year paper at Harvard Law School. His report is an insightful analysis, not only of the role of lawyers, law and litigation, but of political circumstances surrounding school reform in Kentucky as well.

We are grateful for his interest, careful research and willingness to share this information.

Robert F. Sexton
Executive Director
June 29, 1991

ACORNS IN A MOUNTAIN POOL: THE ROLE OF LITIGATION, LAW AND LAWYERS IN KENTUCKY EDUCATION REFORM

Ronald G. Dove, Jr.

Jesse Stuart, the famous Kentucky writer and school teacher, dreamed of a day when Kentucky children would no longer have to "grow up like uncultivated plants."[1] He taught during the 1920s and 1930s, a time when "[h]undreds of Kentucky farmers had better barns in which to stable mules, bulls, and sows than school rooms for their children."[2] Illiteracy, poverty and inequality were the realities of the day, and powerful local politicians often blocked reforms.[3] Despite all this, Stuart refused to accept that children "born in the city or town should have a better education than [children] born among the valleys or on the hills."[4]

The dream of an adequate and equitable school system remained unfulfilled as Kentucky approached the last decade of the twentieth century. In 1987-88, nearly forty percent of Kentucky's children lived in poverty.[5] The schools they attended continued to be regarded as "[some] of the worst in the nation."[6] Statistics gathered during the 1980s showed that Kentucky was at or near the bottom in per pupil expenditures, high school graduation rates and adult literacy.[7] In addition, many school districts were plagued with problems of mismanagement, nepotism and tax fraud.[8]

Students attending school in poor districts still received an education inferior to that given students in more affluent districts. In 1985-86, the wealthiest district in Kentucky spent

$4,361 per pupil, while the poorest district spent only $1,767 per pupil.[9] Such disparities produced a wide gap in the quality of physical facilities and academic programs offered.[10] Poor schools held classes in run-down buildings and could not provide students with advanced science, English or math courses.[11] While wealthy districts[12] were purchasing computers for their classrooms, many rural districts in eastern Kentucky could not even afford library books or textbooks.[13] Differences in achievement test scores and graduation rates reflected these inequities.[14]

In the midst of this crisis, a group of educators and lawyers came up with an idea that sparked one of the most sweeping educational reform efforts this nation has ever seen. They sued the state legislature for failing to provide "an efficient system of common schools throughout the State" as required by the Kentucky Constitution.[15] On June 8, 1989, their idea paid off; the Kentucky Supreme Court held that "Kentucky's <u>entire</u> <u>system</u> of common schools [was] unconstitutional."[16] The court directed the General Assembly to go back to the drawing board and create a new system that provided adequate and equal educational opportunities for all.[17]

"To the surprise of many people, including [the litigators],"[18] the state legislature complied with the court's mandate by raising taxes and enacting the Kentucky Education Reform Act of 1990.[19] The Act radically reshaped the curriculum, governance, and financing of Kentucky schools. Some of the more

innovative ideas adopted in the statute include rewards and sanctions tied to school performance,[20] school-based decision making,[21] and preschool programs for at risk children.[22] Nepotism and other abusive political practices were prohibited in most circumstances.[23] The Act also provided a guaranteed level of funding per student[24] and a method for raising poor districts to the level of wealthier districts.[25] Kentucky thus "embarked on a crusade" to better educate its children.[26]

How did this miracle happen? Why did litigation spark sweeping reform in Kentucky when it has failed to do so in other states with similar facts and constitutional provisions?[27] Did non-legal factors influence the outcome? What role did lawyers play?

This case study concludes that the Kentucky miracle was the result of legal, social and political forces coming together at the right time in history. It further suggests that lawyers were essential in orchestrating the marriage. Part I tells the story of how a group of educators and lawyers got together and won a major victory for Kentucky schoolchildren. Part II assesses the significance of non-legal factors in achieving the result. Part III examines the multiple roles that lawyers played in the process. Hopefully, this case study will provide ideas for lawyers who are looking for ways to bring about education reform in other states.

I. A VICTORY FOR KENTUCKY SCHOOLCHILDREN

A. Failure of Early Reform Efforts

The history of education reform in Kentucky prior to 1985 was one in which "every forward step taken . . . [was] countered by one backward step."[28] In 1930, the General Assembly tried to help poor districts by creating a special equalization fund.[29] This effort was held unconstitutional by the state's highest court.[30] Lawmakers responded by amending the state constitution so that they could exercise more control over the allocation of state money for schools.[31] They set up a program in 1954 to distribute funds on the basis of need to school districts that levied the required minimum property tax rate.[32] This minimum rate was not very effective at generating revenue because property was always assessed at well below fair market value.[33] In 1965, a group of taxpayers, parents and schoolchildren challenged the constitutionality of these unfair assessment practices and won.[34] Their victory in court was short-lived, however, because the legislature soon passed a "rollback law" that reduced property tax rates in direct proportion to the revenue gains that would have been generated by fair market value assessments.[35]

Legislative efforts to ease the virtual funding freeze created by the "rollback law" were either ineffective or favored the wealthy districts. A program enacted in 1976 to help narrow the spending gap between rich and poor districts was never

adequately funded.[36] In 1979, the General Assembly passed a law requiring school districts to reduce property tax rates even further.[37] Tax rates declined as property values increased, producing a static revenue.[38]

This "one step forward, one step back" approach to education reform suggests that social, political and legal forces were never truly in synch. While many Kentuckians wanted change, there were others who felt that "if it was good enough for Pap, it's good enough for me."[39] Legislative efforts could hardly make it out of the starting gate before being thwarted by anti-tax sentiment, property tax evasion and political corruption in poor districts.[40] Though the lawsuit option was discussed by some educators and lawyers during the 1970s,[41] there was little enthusiasm for it (especially in light of federal[42] and state court trends).[43] No one had the time or resources necessary to fight such an uphill battle.[44]

B. The Birth of a Lawsuit

In the November elections of 1983, veteran educator Arnold Guess[45] "guessed wrong" as to who would be elected State Superintendent of Public Instruction.[46] He was immediately fired from his position at the Department of Education by the incoming Superintendent.[47] With time on his hands, Guess pondered an idea that had been in the back of his mind for years--a lawsuit challenging the constitutionality of Kentucky's school finance system.[48] He talked to friends and fellow educators about the

idea and decided to hold a meeting to discuss its feasibility. Selected school superintendents from throughout the state were invited to attend.[49]

The first meeting of the "Council for Better Education" ("the Council") took place in Frankfort, Kentucky on May 4, 1984.[50] The superintendents listened to Arnold Guess and two school finance experts[51] explain the bases for legal action. All agreed that the constitutional question needed to be answered and that the legislature had failed to meet the needs of poor districts. The superintendents appointed a steering committee to recruit new members and select legal counsel. Guess urged everyone to go back to their school boards and get support for a fifty cent per child assessment to finance the suit.[52]

It did not take long for State Superintendent of Public Instruction Alice McDonald to express her outrage over the proposed lawsuit. At a conference for Kentucky school superintendents in late May, McDonald made it clear that she was "adamant in [her] opposition" to the suit and that she might "get an injunction for misappropriation of funds."[53] The chairmen of the state House and Senate education committees agreed with McDonald's position, and issued a joint statement to that effect.[54]

Early efforts by the Council for Better Education to stem the mounting tide of opposition failed.[55] Council consultant Kern Alexander testified before the Interim Joint Committee on Education in an attempt to persuade lawmakers that the suit was

just. His comments were dismissed out of hand as an "affront to the General Assembly."[56] After the hearing, State Superintendent Alice McDonald commented that "it [was] foolhardy to suggest [that] the courts [would] come up with a decision [that everyone in the] room and the public [could] agree to."[57]

Such hostile reactions highlighted the Council's severe negative image problem; they were perceived by many as "just a bunch of rabble-rousers" looking for more state money to waste and mismanage.[58] When the steering committee met to select an attorney, they knew that they had to find someone who would bring legitimacy to the lawsuit--someone who would give the Council "instant credibility."[59] The group also wanted an attorney with an excellent legal mind and a strong support staff.[60] The name that came to mind immediately was Bert Combs--a former Kentucky governor and federal judge who was the senior partner in the state's largest law firm. Arnold Guess told the committee that Bert Combs was an old friend and that he could persuade Combs to take the case. The committee agreed to let Guess try.[61]

Bert Combs had been born and raised in the hills of eastern Kentucky. His mother was a schoolteacher and his father was a farmer and local politician. He attended schools "that had no library, no laboratory, a very sketchy curriculum [and] poorly paid teachers."[62] Combs overcame this educational "handicap" and graduated with a law degree from the University of Kentucky. After serving as Gen. Douglas MacArthur's chief of war crime investigations in the Philippines, Combs returned to Kentucky and

was eventually elected to the state's highest court. He resigned from the court after three years to run for governor. Combs lost his first race, but won the second--serving as governor of Kentucky from 1959-63. During his term, Combs got the legislature to pass a sales tax to improve the schools. For this reason, he was often called "the education governor." Combs was appointed to the United States Court of Appeals for the Sixth Circuit in 1967. He resigned in 1970 to run for governor again, but lost. After a distinguished career in public service, Combs joined the law firm that became Wyatt, Tarrant & Combs.[63]

On October 3, 1984, Arnold Guess and several members of the steering committee "dropped in" to see Bert Combs.[64] It soon became apparent to Combs that this "was more than just a social visit."[65] Guess described the proposed lawsuit and reminded Combs "that [he] claimed to be a friend of education and had not objected to being called 'the education governor.'"[66] Combs was reluctant to take the case and told the group to "think about it some more."[67] He knew that such a lawsuit would be very difficult to win and that his corporate clients might be vulnerable to retaliation by the governor and legislature.[68] Guess and his group went away, but were not discouraged. As Combs tells the story: "They didn't take 'no' for an answer--they came back two or three times until finally my conscience got to hurting."[69] Combs told the committee that he would take the case if they could convince thirty to forty percent of Kentucky school districts to join in the effort.[70]

Arnold Guess went to work recruiting new members for the Council for Better Education. In the words of attorney Ted Lavit:

> Every time the superintendents of education would meet in Louisville, Guess would catch them coming out of the main room and in the lobby and say "Come on, you poor districts--follow me--we're going to have a meeting over here and organize." And that's how he got them. . . . [T]hey'd pay out of their pocket for that meeting room to organize.[71]

Bert Combs spoke at some of these meetings in an attempt to drum up additional support.[72] When Guess and the steering committee told Combs that 66 of 177 districts had decided to join, Combs agreed to take the case on a pro bono basis.[73]

Bert Combs gave the Council for Better Education "instant credibility."[74] He put together a team of three attorneys and an education law expert to draft the complaint and research procedural issues. Kern Alexander was chosen as the Council's not-so-secret-weapon. He was a Kentucky native and author of over thirty books on education law and policy. Alexander was an expert on school finance cases and had served as a consultant in several. He had also conducted four studies documenting the need for education reform in Kentucky. Though he had been away from Kentucky for many years (serving as Education Policy Coordinator for the Governor of Florida and as a professor at the University of Florida), Alexander maintained his ties with the Kentucky educational and political communities. In November 1985, Alexander was named President of Western Kentucky University.[75]

Rounding out the legal team were attorneys Ted Lavit, Thomas

Lewis and Debra Dawahare. Ted Lavit was brought in to the case on Kern Alexander's suggestion.[76] Lavit and Alexander had worked together on a 1972 lawsuit challenging the way the federal government distributed education money to the states.[77] They were also old friends and college roommates.[78] Thomas Lewis was of counsel with Wyatt, Tarrant & Combs during the early phases of the lawsuit.[79] He returned to teaching law at the University of Kentucky and eventually removed himself from the case because he thought his status as a state employee might present a conflict.[80] Debra Dawahare taught English at the University of Kentucky prior to becoming a lawyer. She served as co-counsel to Bert Combs in all stages of the case and was made a partner at Wyatt, Tarrant & Combs after the case was decided.[81]

Kern Alexander and Ted Lavit wrote most of the complaint; Bert Combs and Thomas Lewis refined and embellished it.[82] Second year associate Debra Dawahare did much of the research on jurisdiction and standing.[83] Ted Lavit worked on incorporating the Council for Better Education and "was instrumental in helping to stave off" a controversy over the use of school board funds to sue the state.[84]

The sixty-six members of the newly incorporated Council for Better Education gathered for the first time on May 8, 1985. They adopted bylaws, elected a board of directors, and received an update from the legal team on the contents of the proposed complaint.[85] Following the meeting, the board of directors met and elected officers, named a depository for Council funds, and

formally directed Bert Combs, Ted Lavit and Kern Alexander to develop the complaint, gather evidence and prepare to bring suit "at the earliest possible time."[86]

Member school boards of the Council for Better Education each contributed fifty cents per student to pay for filing fees, consultant fees, and other lawsuit expenses.[87] Bert Combs and Ted Lavit worked for free and associate hours were billed at a greatly reduced rate.[88] Even though the case was largely a pro bono effort, State Superintendent McDonald and others argued that the use of any school board funds to sue the state was illegal.[89] Ted Lavit anticipated this argument and wrote a memorandum putting it to rest.[90] Case law clearly indicated that school boards could spend a reasonable amount on legal fees "to promote public education."[91] In an advisory opinion issued on July 2, 1985, the Kentucky Attorney General agreed that the proposed lawsuit met this educational purpose test.[92]

Most of the superintendents were eager to proceed with the lawsuit; Bert Combs, however, was a bit more cautious. He knew that litigation was a gamble and wanted to make sure that every effort was made to achieve a political settlement prior to filing suit.[93] The Council deferred to Combs' judgment, setting a tone of unity and cooperation that lasted for the duration of the case.[94] In the summer of 1985, the state capital was buzzing with the rhetoric of school reform.[95] Governor Collins proposed a major education improvement program and called a special legislative session to consider it.[96] Combs met with the

Governor on several occasions to lobby for increased funding for poor districts.[97] Council leaders hoped that the mere threat of a lawsuit would spur the legislature to action.[98]

Instead of addressing the Council's concerns, the General Assembly "threw [them] crumbs."[99] The funds promised were "but a pittance of what [was] needed to equalize the school districts."[100] Ted Lavit argued that the Council could "do much better" and that "if [they had] the courage to begin the suit, [they would] win."[101] Bert Combs and the Council agreed. On November 20, 1985, the lawsuit was finally filed in Franklin Circuit Court.[102]

Combs opted for an "everything but the kitchen sink" approach to naming parties--there was little state precedent for this type of action and he knew that the defendants would raise every possible technical objection.[103] The plaintiffs were the Council for Better Education, Inc., seven local school boards, and twenty-two public school students suing on behalf of themselves and the class of all schoolchildren similarly situated in poor districts.[104] The Governor, the Superintendent of Public Instruction, the State Treasurer, the President Pro Tempore of the Senate, the Speaker of the House of Representatives, and the members of the State Board of Education were named as defendants.[105] The House and Senate leaders were sued in their representative capacity because suing each member was viewed as a practical impossibility.[106]

The plaintiffs alleged that Kentucky's "statutory structure

for funding public schools" was inadequate and inequitable[107] in violation of the state constitutional provision requiring "an efficient system of common schools throughout the State."[108] They also complained that students from poor districts had been denied due process and equal protection under both the United States and Kentucky Constitutions.[109] The Council sought a declaratory judgment and a court order "commanding the General Assembly to increase the funding for public schools in an amount sufficient to provide an equitable and adequate funding program for all school children."[110]

C. **Legislative Reaction, Discovery and Trial**

The lawsuit infuriated many legislators who felt they had "tried [their best] to find funds for our boys and girls" in the 1985 special session.[111] Hungry for revenge, the Senate quickly passed a bill making it illegal for school boards to use state funds to sue the legislature.[112] The bill was designed to apply retroactively and kill the suit.[113] Fortunately for the plaintiffs, this legislative counterattack fizzled when it reached the House. The chairman of the House Education Committee (who happened to be a representative from a plaintiff school district) thought the lawsuit had merit and let the bill die in committee.[114]

The leadership of the General Assembly hired attorney William Scent to defend them in court.[115] He was assisted by attorneys from the Kentucky Department of Education during the early stages

of the lawsuit.[116] Answers filed by the defendants attacked the standing of the plaintiffs, the jurisdiction of the court to hear political questions, and the failure to join all members of the General Assembly as defendants. The defendants denied all alleged constitutional violations and put forth an affirmative defense that the education reform measures passed in the 1985 special session and proposed for 1986-88 would correct the problems described in the complaint. Unpersuaded, the court refused to grant summary judgment.[117]

Bert Combs opted for a "honed down approach" to discovery, building a clear factual foundation without getting "bogged down in technicalities."[118] The depositions of Arnold Guess, Kern Alexander and others traced the history of failed reforms and the evolution and mechanics of a warped school finance system.[119] Poor districts were compared to rich districts and Kentucky was compared to other states. Tales of inadequacy and inequity were told. Statistics, reports and studies were "shoved" into the record as part of each deponent's testimony. Extensive proof was taken, but not to the degree that had been necessary in similar lawsuits in other states.[120] The defendants were never deposed because Bert Combs knew what they were going to say and wanted to conserve Council funds.[121] Combs was confident that the evidence was clearly on his side and thus felt comfortable with a streamlined discovery effort.[122]

On August 4, 1987, the trial finally began.[123] The case was heard without a jury by Judge Ray Corns, one of two judges on the

Franklin Circuit Court.[124] Judge Corns was very familiar with school finance issues; he had worked for fifteen years as chief legal counsel for the Kentucky Department of Education[125] and had helped Kern Alexander write a case book on education law.[126] The judge had offered to recuse himself due to this prior experience, but none of the parties objected.[127] Concerns about possible bias were outweighed by the perceived benefits of judicial expertise, Corns' promise of impartiality, the lack of a more neutral alternative, and the likelihood of appeal regardless of outcome.[128]

The trial itself was short, "very civilized" and "unremarkable."[129] Evidence was presented in the form of depositions, oral testimony and exhibits.[130] In his opening statement, Bert Combs painted a picture of a system that deprived poor children of basic educational needs and discriminated against them because of where they lived.[131] School finance experts, local superintendents and students confirmed this bleak image with their testimony.[132] Photographs of dilapidated school houses in eastern Kentucky were put on display.[133]

Defense attorney William Scent responded by blaming the poor districts for the mess they were in.[134] His witnesses pointed to low tax effort, mismanagement and waste as the real reasons for school failure.[135] Legislators testified that education reform was a top priority but that resources were limited because most Kentuckians opposed new taxes.[136]

This shift the blame strategy backfired on the defense. It

was "too accusatory and instead drew sympathy to the poorer districts."[137] The defendants tried to demonstrate that good schools were possible even in districts with low tax efforts, but they made the mistake of using a rich district as their model:

> There [was] excellent farm land [in defendants' model district]; agricultural specialists [came] from all over the world [to] 'oooh' and 'aaah' over the soil. There [were] nice homes there. The land [was] pleasant and accessible. You [could] go around the block with a school bus and pick up more kids than you [could] pick up driving two hours up and down the hollows in eastern Kentucky.[138]

The defendants' model district could raise more money with a low tax effort than poor districts could raise with a "monumental tax effort."[139]

In addition to this battle over blame, witnesses offered various interpretations of the constitutional phrase "efficient system of common schools."[140] Definitions of "efficiency" ranged from "making the maximum use of available resources" to "provid[ing] equal educational opportunities."[141] Underlying both the blame debate and the "efficiency" debate was the tension between the will of the majority and fundamental rights. Arguments that all Kentucky children had the right to an equal and adequate education were countered by arguments pointing to popular anti-tax sentiment, resistance to redistribution, and desire for local control (with its waste, mismanagement and undervaluation of education side effects).

The court took a six month recess to study the evidence before hearing closing arguments. During the break, several significant events occurred. John Brock, a superintendent from a

plaintiff district, was elected State Superintendent of Public Instruction (Alice McDonald was limited to one term under Kentucky law).[142] Though Brock was silent about the case during his campaign, he soon notified the court that his office was dropping its defense of the lawsuit to support the Council for Better Education.[143] This decision was a major blow to William Scent, who had relied on Department of Education staff throughout discovery and trial.[144]

The Council received another boost from an amicus brief filed by two influential citizens' groups.[145] The brief stressed that "waste and mismanagement [by local school districts was] not a defense," but rather "[was] a further indictment of [the] existing system" requiring an injunctive remedy.[146] In a rally sponsored by the Kentucky Education Association (the state's largest teachers' union), over 15,000 educators, parents and schoolchildren marched around the state capitol demanding more money for education.[147] They were ignored.[148] It was time for the court to act.

D. Judge Corns' Ruling

On May 31, 1988, Judge Corns ruled that Kentucky's school finance system was "unconstitutional and discriminatory."[149] He found that "[t]he system of financing create[d] revenue disparities . . . so pronounced as to produce great educational disadvantage in property poor districts."[150] Evidence of widespread illiteracy, low test scores, and the lack of programs

and facilities indicated that schoolchildren in the plaintiff class "suffer[ed] from an extreme case of educational malnutrition."[151] Corns concluded that education was a fundamental right under the Kentucky constitution[152] and that the General Assembly had failed to "provide for an efficient system of common schools throughout the state" as required by that constitution.[153] He retained jurisdiction and promised to appoint a special committee to "aid" the court in defining the essential features of a constitutional system.[154]

Bert Combs was delighted with Judge Corns' ruling and said that a tax increase would likely be the end result.[155] Several prominent legislators agreed.[156] William Scent, on the other hand, was "dumbfounded" by the decision and vowed to appeal.[157] All recognized that the opinion was "just the beginning of the beginning" and that the difficult task of formulating a remedy still lie ahead.[158] Even so, there was a general feeling among reformers that the stage was set "for some pretty exciting times" that "could change the course of history in Kentucky."[159]

Two days after the decision, the leadership of the General Assembly decided to appeal.[160] Bert Combs agreed that the issue was "sufficiently important" to warrant a ruling by the Kentucky Supreme Court.[161] In a surprise political move, Governor Wilkinson voiced his support for Judge Corns' opinion and declined to join in the appeal.[162] The Governor's decision may have been influenced by Kern Alexander, who met with the Governor on several occasions and urged him to withdraw.[163]

Judge Corns soon appointed a five-person "advisory" committee to develop guidelines for reform that could be used in preparing his final judgment.[164] Kern Alexander chaired the committee, which held a series of five public hearings and produced a report.[165] The press coverage that the hearings received helped solidify support for the opinion.[166] The report suggested nine principles to guide the legislature in providing an "efficient system of common schools."[167]

These nine principles were incorporated in Judge Corns' final judgment issued on October 14, 1988.[168] The court broadened its definition of "efficient" and listed the minimum requirements for an "adequate" school system.[169] It emphasized that the duty to provide such a system rested solely on the General Assembly and could not be delegated.[170] Though the court recognized that it did not have the authority to prescribe specific legislative remedies,[171] it did make several strong suggestions. These included greater state supervision to eliminate waste and mismanagement, proper funding of equalization programs already in existence, and the "imposition of new taxes."[172] The court retained jurisdiction for the purpose of enforcing the judgment and urged the parties to expedite their appeal.[173]

E. Appeal to the Kentucky Supreme Court

It did not take long for Bert Combs and William Scent to resume verbal combat. Two days after the trial court's final order, the two squared off in a debate at a conference of school

board attorneys. Scent characterized the lawsuit as a "massive propaganda vehicle to try to stampede everybody into levying a few taxes" and argued that the plaintiffs had about as much standing as the "East Bernstadt Marching and Chowder Society."[174] Combs accused Scent of avoiding the merits of the case by digging up "little obscure technicalities" and predicted that the Kentucky Supreme Court would affirm Corns' ruling "before the water gets hot."[175]

Scent moved to transfer his appeal directly to the Kentucky Supreme Court, bypassing the court of appeals. The motion was granted and an accelerated briefing schedule was set.[176] The Supreme Court heard oral arguments on December 7, 1988--less than two months after Judge Corns' final ruling.

In his brief and argument before the court, William Scent argued that the appellees lacked standing, that the General Assembly had provided an "efficient" system and was not to blame for the problems in poor districts, and that the trial court had violated separation of powers doctrine.[177] Bert Combs countered these arguments and focused the court's attention on the moral dimensions of the case: "Kentucky has become recognized, unfortunately, as the most illiterate state in the nation. . . . Countless young minds throughout our fair state are being wasted. . . . Judge Corns' decision is [both] legally sound [and] morally sound."[178] The justices grilled both sides with equal intensity; when the arguments were over, no one could predict how the court would decide.[179]

F. **An Historic Decision: "Kentucky's Entire System of Common Schools is Unconstitutional"**

"My clients asked for a thimble-full, and [instead] they got a bucket-full,"[180] said Bert Combs after reading the Supreme Court's opinion in Rose v. Council for Better Education, Inc. holding that "Kentucky's entire system of common schools [was] unconstitutional."[181] In this opinion, handed down on June 8, 1989, the court directed the General Assembly to go back to the drawing board and "re-create [and] re-establish a new system of common schools" that complied with § 183 of the Kentucky Constitution.[182] The court listed nine "minimal" standards for compliance:

(1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
(2) Common schools shall be free to all.
(3) Common schools shall be available to all Kentucky children.
(4) Common schools shall be substantially uniform throughout the state.
(5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.
(6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
(7) The premise for the existence of common schools is that all children have a constitutional right to an adequate education.
(8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.
(9) An adequate education is one which has as its goal the development of the seven capacities recited [by the trial court and listed supra note 169].[183]

All statutes and regulations relating to education were covered

by the holding--not just those pertaining to school finance.[184]

The court rejected most of the procedural claims raised by the appellants. It held that the Council for Better Education and the local school boards had the legal authority and standing to sue.[185] Moreover, the court determined that the General Assembly was properly before the court, even though the President Pro Tempore of the Senate and the Speaker of the House were the only legislators named in the complaint.[186] Judge Corns' decision to retain jurisdiction was reversed by the court on the grounds that it violated state separation of powers doctrine.[187] Without the power to assume a supervisory role, the court had no choice but to simply announce its ruling and hope that the General Assembly complied.[188]

The majority opinion was not immune from charges of judicial activism. Even Bert Combs admitted: "I don't know how we persuaded the Supreme Court. . . . I think the court persuaded itself."[189] Council attorneys argued that the system was inefficient because of the school finance program. However, the Supreme Court understood the Council's argument as an appeal to invalidate the entire inefficient system (not just the statutory mechanisms that funded that system).[190]

One dissenting justice denounced the court's procedural holdings as "pure fiction" and argued that the issue of whether the legislature was adequately performing its constitutional duty was a "political question, pure and simple."[191] The dissent also feared a never-ending flood of lawsuits resulting from the vague

and unmanageable standards set down by the court.[192] In William Scent's view, the Supreme Court simply decided that they "ought to do something" and trampled on rules of procedure and separation of powers in the process.[193]

Despite these charges, most people were overjoyed with the decision. "The plaintiffs scored beyond their fondest hopes," exclaimed Bert Combs.[194] State Superintendent John Brock called the opinion "simple, brilliant, and . . . revolutionary."[195] Governor Wilkinson praised the Supreme Court for providing Kentucky with the greatest opportunity for positive change since the birth of the state constitution.[196] The reactions of those involved in the case also contained an element of astonishment; Debra Dawahare was "completely shocked" by the decision,[197] Bert Combs called it a "near miracle."[198] These feelings were tempered by a concern that the General Assembly might just "pay lip service," "drag its feet," or ignore the ruling altogether.[199] Council attorneys feared that the court had no way of enforcing its decision.[200]

Could the defendants have won the case if they had had more resources or chosen a different strategy? Probably not, according to school finance expert Kern Alexander. Alexander commends William Scent for putting on a thoughtful defense and not resorting to the obstructive tactics employed in other states to financially squeeze plaintiffs and delay the decision on the merits.[201] Even if such tactics had been used, they would have eventually been overcome by the sheer weight of the evidence, the

constitutional language, and the political and social forces described later in this case study. William Scent jokes that he could "have had the staff of the entire Harvard Law Review and faculty [and] it still wouldn't have changed the result."[202] In his view, the case was "greased from the beginning."[203]

G. A New Beginning: The General Assembly Responds

Many people, including Bert Combs, were surprised when the General Assembly seized the initiative and began the monumental task of rebuilding the Kentucky school system.[204] The legislative leadership created a special task force to study options and make recommendations. This Task Force on Education Reform was composed of eight Senate leaders, eight House leaders, and six representatives appointed by the Governor.[205] It formed three committees--Curriculum, Governance, and Finance--and hired four expert consultants to assist in the project.[206] The committees held hearings throughout the summer and fall of 1989.[207] They also considered ideas and comments received through the mail and over a special toll-free telephone line.[208]

Bert Combs and the other litigators kept a low profile during this stage and did not help shape the legislation.[209] "Nobody wanted it to look like [the judicial branch] was telling the General Assembly what to do."[210] Combs did publicly suggest that a two-cent increase in the state sales tax would be a good way to fund the reforms.[211] He also kept in "close touch [and was] a close observer of the General Assembly and the Governor's actions

and attitudes."[212]

The Council for Better Education soon became worried that the Task Force was shifting its attention away from the issues of adequacy and equity (and onto issues like nepotism and mismanagement). They hired Kern Alexander to draft a document that would remind the Task Force of the guidelines adopted by the Supreme Court. This document was distributed to the Task Force, General Assembly, and newspapers throughout the state.[213] Shortly after it was mailed, the Finance Committee became more active and began to address the Council's concerns.[214]

Governor Wilkinson surprised almost everyone and made the legislature's job much easier by reversing his "no new taxes" stance in January 1990.[215] Bert Combs and Council President Jack Moreland publicly applauded the move.[216] The General Assembly "extended an olive branch" to the Governor[217] and the Task Force put the finishing touches on its education reform bill. The bill incorporated the recommendations of the Curriculum, Finance and Governance Committees and the funding base proposed by the Governor.[218] It swept through the House and Senate and was signed by Governor Wilkinson on April 11, 1990.[219]

The most important political factor in the passage of the Education Reform Act was the power of the Task Force. Since the Task Force was composed of the legislative leadership, the bill that emerged was supported and promoted by that leadership.[220] The Task Force was no mere blue-ribbon committee; its members had the ability to shut off debate,[221] assess the political

feasibility of various options,[222] and offer "incentives" to reluctant legislators.[223] Interest groups were kept "off balance" by the three committee system and the comprehensive nature of the bill. There were so many controversial proposals being floated around at different times by each committee that interest groups "couldn't figure out which way to go."[224] The Supreme Court deadline also played a role--if the law had not been passed by the end of the regular session, then the whole school system would have ceased to exist (constitutionally). "The concept of Junior staying home all year long got the legislature determined to pass something."[225]

The Education Reform Act of 1990[226] radically restructured Kentucky schools. It established a guaranteed level of funding per student and a system for gradually leveling the disparities between rich and poor districts.[227] An Office of Education Accountability was created to monitor waste, mismanagement, and compliance with the Act.[228] Nepotism and other abusive political practices were banned.[229]

The most drastic changes came in the broad area of curriculum; the Act implemented school-based decision making,[230] established a new primary school program,[231] called for the development of family resource centers and youth services centers in poor areas,[232] and mandated preschool programs for educationally at risk four-year-olds.[233] In addition, some of the toughest accountability standards in the nation were put in place.[234] Successful schools will receive monetary rewards,

unsuccessful schools will get expert help.[235] If a school district fails to improve over time, the state can remove the superintendent and local school board members from office and appoint replacements.[236]

The Act was a "mixed blessing" for the Council for Better Education. While all members cheer the new funding system, some are apprehensive about the accountability and nepotism provisions.[237] The Council realizes, however, that the Act is "the best game in town" and that the nation is watching to see how Kentucky performs.[238] In the words of Bert Combs:

> Kentucky has now, by reason of this legislation, decided to become educated--and we have embarked on a crusade for that purpose. Don't be surprised if we should within the next decade develop a first class, world-wide educational system.[239]

Such a "first class" education would be a true victory for Kentucky schoolchildren.

II. NON-LEGAL FACTORS THAT INFLUENCED THE OUTCOME

The story of the Kentucky case would be incomplete without further analysis of the social and political factors influencing the result. In many ways, victory was a "function of social forces."[240] Newspapers and citizens' groups trumpeted the cause of education reform and supported the judicial decisions. Politicians and other key players used their connections and acted with unusual courage. Wealthy districts chose not to put up a fight. These factors and more are discussed in the sections that follow.

A. Publicity and Support from the Media and Citizens' Groups

Education reform movements need grassroots support in order to succeed. In Kentucky, this support was generated by citizens' groups, most notably the Prichard Committee for Academic Excellence. The Prichard Committee was named after Edward F. Prichard, Jr., a lawyer who played a "very significant" role in Kentucky education reform, "perhaps trigger[ing] [the] movement."[241] A product of Kentucky schools, Prichard entered Princeton University at age sixteen, graduated from Harvard Law School and clerked for Supreme Court Justice Felix Frankfurter.[242] He was described as "the most impressive young man of [his] generation"--a "man of dazzling brilliance" who was the "dazzling center" of the New Deal brain trust.[243] By his 30th birthday, Prichard had held numerous positions in the Roosevelt

administration--including White House assistant to the President. He returned to Kentucky "where it was universally assumed he would soon be governor or a U.S. Senator."[244]

Instead, Prichard was caught stuffing ballot boxes and was sent to federal prison (where he spent five months before being pardoned by President Truman). Several years of depression and personal failure followed. "But Kentucky politics, having broken Prich, offered a chance of redemption."[245] During the Kentucky gubernatorial campaigns of 1955 and 1959, Bert Combs and Ed Prichard became good friends. Combs helped to rehabilitate Prichard, publicly defending him in the face of ridicule from political enemies. In return, Prichard helped Combs win the 1959 election (the honest way) and served as a close advisor and speech writer during Combs' administration. He went on to become an influential force in Kentucky politics, holding appointed positions and advising governors.[246] According to Combs, Prichard "never became cynical or disillusioned and really demonstrated unusual courage [even after losing his sight to diabetes]."[247] He decided to "rehabilitate himself and leave a legacy . . . by promoting education in Kentucky."[248] His leadership on the Kentucky Council on Higher Education and the Prichard Committee allowed him to fulfill this goal.

The Prichard Committee evolved from a state commission formed in 1980 to study and recommend solutions to problems in higher education. Under Ed Prichard's leadership, the committee soon decided to fight for reform at the elementary and secondary

school levels as well. It broke its ties with state government and became an independent organization funded by private donations and composed of parents, prominent citizens and community leaders.[249] The Prichard Committee's unique structure insulated it from partisan politics and special interest groups and "made it the most respected group in the state working in education."[250]

The committee initially chose not to get involved with the Council for Better Education lawsuit because of speculation that the plaintiffs were only interested in money, not comprehensive reform. Bert Combs (who had been a member of the committee since its formation) helped persuade committee leaders to change their minds. Recognizing that the suit could have a major impact on the quality of education in Kentucky, the Prichard Committee filed an amicus brief in the circuit court supporting the Council's position.[251] Following the Supreme Court decision, the committee testified before the Task Force on Education Reform and was instrumental in getting Kentucky's key education interest groups to agree on a set of joint recommendations for reform.[252] The organization plans to serve as an "education watchdog" that will monitor and report on progress made under the Act.[253]

The Prichard Committee's greatest contributions, however, were made before the lawsuit was born. The committee rallied citizen support for education reform by staging 140 town forums across the state on the night of November 15, 1984.[254] Nearly twenty thousand people attended.[255] Many of the ideas suggested

at the meetings were incorporated in a report issued by the Prichard Committee in 1985.[256] This report helped persuade Bert Combs and others that a lawsuit was needed.[257] In addition, the forums sparked the creation of new citizens' groups interested in education.[258]

Bert Combs had suggested the town forum idea after the legislature failed to address education reform in the 1984 session.[259] After spending weeks organizing the town forums, Ed Prichard was forced to enter the hospital on the day they were scheduled (he died one month later).[260] Combs stepped in for his friend and delivered introductory remarks to forum attendees via Kentucky Educational Television.[261]

Much credit must be given to the Kentucky media, especially the Lexington Herald-Leader and Louisville Courier-Journal, for putting and keeping school reform issues in the public spotlight. Stories were published about the lawsuit months before it was even filed.[262] The Prichard Committee town forums received widespread media coverage.[263] The trial, Judge Corns' ruling, the Corns committee hearings, and the Supreme Court oral arguments were all well publicized.[264] Editorials overwhelmingly favored the plaintiffs;[265] William Scent argues that this "media blitz" put pressure on the Supreme Court to uphold the lower court ruling.[266] When the Supreme Court decision came down, newspapers devoted many pages to analysis, reaction, and commentary.[267] The Lexington Herald-Leader called the decision a "golden opportunity" and urged Kentuckians to "seize the moment."[268] The

media also played an "essential" role during the legislative phase by investigating and reporting abuses in the Kentucky school system.[269] Public pressure became so great that the General Assembly was forced to act.

B. Political Courage, Connections and Stature

On paper, the Kentucky lawsuit was an easy case. The legal issues were debatable but not complex and the facts clearly favored the poor school districts. The work product of Council attorneys could have been duplicated by others. Yet it is unlikely that the plaintiffs could have won the case without Bert Combs.[270] Combs was a venerable giant in Kentucky politics and was respected by Judge Corns, the Supreme Court, and the legislature.[271] His status as a former federal judge added weight to his legal arguments. Combs gave the Council for Better Education "instant credibility"[272] and made it impossible for defendants to hide behind obstructive tactics. His statements about the case were reported in the press,[273] helping to create an environment of public pressure that may have influenced the outcome.

Another political variable in the reform equation was the elected nature of the state judiciary. Since Kentucky judges are elected, they are "subject to political pressures [and] understand the problem about increasing taxes as good as anybody else."[274] When Judge Corns declared Kentucky schools unconstitutional and strongly suggested the "imposition of new

taxes,"[275] his friends told him he had committed "judicial suicide."[276] This act of political courage also demonstrated the importance of luck and political connections. The plaintiffs were "fortunate" to get Judge Corns because of his background in education law.[277] Corns had worked for fifteen years as chief legal counsel for the Kentucky Department of Education.[278] During his tenure at the Department, Corns visited every school district in Kentucky many times.[279] He also helped Kern Alexander write a case book on education law[280] and assisted Ted Lavit in a lawsuit challenging the way federal education funds were distributed to the states.[281] Corns' familiarity with the issues, parties, attorneys and experts made him the ideal judge from the plaintiffs' perspective.

Governor Wilkinson and many legislators took a significant political risk when they agreed to raise taxes to pay for the Education Reform Act of 1990. By introducing a tax package, Wilkinson broke the key promise of his campaign (though his lame duck status lessened the sting).[282] The General Assembly acted in an "heroic" fashion by "biting the tax bullet" and facing up to its constitutional duty.[283] Numerous legislators distinguished themselves for "visionary" leadership and creative lawmaking.[284] These political acts, while commendable, did not occur in a vacuum. They were prompted by a Supreme Court decision that took years of litigation to achieve. The court's mandate both constrained and empowered the state's political leaders. The status quo was no longer acceptable--the General Assembly had to

provide an efficient system. However, legislators had the freedom to start from scratch and could use the mandate as a shield when justifying tax increases to constituents. Public support for education reform also made it easier for politicians to act courageously.

C. Roots, Robin Hood, and Perseverance

Both Bert Combs and Judge Corns knew what it was like to receive an inadequate education. The schools that Combs attended in the hills of eastern Kentucky "had no library, no laboratory, a very sketchy curriculum [and] poorly paid teachers."[285] These educational deficiencies "[had] been a handicap to [Combs] through [his] whole life."[286] His sympathy for poor children in similar straits motivated him to take the case.[287]

Judge Corns went to a four room elementary school in a rural county where the "science lab" had only one glass beaker and one wash basin. He had to take all remedial courses during his first year in college just to catch up to other students.[288] Though Corns claims that these educational roots did not influence his legal decision making, he acknowledges that they "confirmed [his] professional judgment in the opinion [he] handed down."[289]

Another factor affecting the outcome of the lawsuit was the widespread belief that the legal remedy need not involve a redistribution of wealth from rich districts to poor districts. This anti-"Robin Hood" perception was nurtured from the very beginning by Bert Combs and the Council as a means of building

public support and keeping rich districts on the sidelines.[290] An active defense of the lawsuit by wealthy districts would have wreaked havoc in the plaintiffs' camp. Victory would have been more expensive, more divisive and far less certain. For this reason, the decision of the rich districts to remain neutral was a "refreshing" one.[291] Without the "Robin Hood" fear, educators from rich districts could hardly oppose the plaintiffs' dream of an equal and adequate education for all Kentucky schoolchildren. The Council's anti-redistribution position also found its way into both the trial court and Supreme Court opinions.[292] It influenced legislators, who insisted on comprehensive reforms and a finance system that did not penalize rich districts in the process of raising poor districts to a higher level.[293]

Finally, the perseverance of Arnold Guess and other leaders of the Council for Better Education inspired those around them and made victory possible. Guess worked tirelessly to build a coalition of superintendents that supported his idea of a school finance lawsuit. He refused to take "no" for an answer, and was finally able to land Bert Combs as plaintiffs' lead counsel.[294] Council leaders were threatened by legislators and by State Superintendent Alice McDonald on several occasions.[295] After the Corns ruling was handed down, plaintiff school districts were audited in an attempt to intimidate the superintendents and force them to withdraw from the case. The gambit failed--all audits were clean.[296] Kern Alexander was also harassed by legislators in his capacity as President of Western Kentucky University. He was

told to "watch it" and was advised not to testify on behalf of the plaintiffs if he wanted his university budgets approved. The threats stopped when it became clear that the media and much of the public supported Judge Corns' ruling.[297]

III. THE ROLE OF LAWYERS

The preceding sections demonstrate that the Kentucky success story was the result of legal, social and political forces coming together at the right time in history. This marriage of forces did not just magically occur; lawyers were essential in bringing the elements together. "We clearly could not have done it without [lawyers]," explains Council President Jack Moreland.[298] Lawyers provided legitimacy, navigated through the courts, and helped draft the legislation. The Kentucky case exemplified the positive side of litigation; without the Supreme Court mandate, the Education Reform Act of 1990 would have never happened.[299]

The first thing that lawyers did was to enhance the legitimacy of the Council for Better Education and their cause. Legislators, the media and the public began to take notice. This legitimacy was derived from the political stature of Bert Combs and the recognition that the lawsuit threat was real. Lawyers had the power to force the governing authorities to defend their actions. Bert Combs and his team advised and instilled confidence in their clients by insisting that a substantial number of poor districts join the effort and by verifying that school funds could legally be used to pay for the lawsuit. Superintendents were confident that the presence of lawyers would protect them from acts of intimidation.

As experts in the litigation process, lawyers proved to be most valuable in navigating through the courts. Bert Combs was able to overcome procedural obstacles and move the case swiftly

through the system. He chose the right court, he chose the right parties, and he chose the right strategy. Council lawyers gathered the evidence of bad and unequal schools and translated it into language persuasive to judges. This ability to advocate positions within the framework of statutes and constitutions is a unique skill that lawyers possess. Bert Combs, Debra Dawahare and Ted Lavit were trained in the art of interpreting constitutions and analyzing precedents. They used these skills effectively in their briefs and oral arguments. They also used their advocacy skills to build public support through the media.

Lawyers played an important role in drafting the legislation. Many members of the Task Force on Education Reform were lawyer-legislators who recognized their "special responsibility for the quality of justice"[300] and the "improvement of the law."[301] They made policy choices and negotiated compromises in furtherance of these ethical obligations.[302] Staff attorneys performed a more traditional "legal" function by putting the Task Force recommendations into proper statutory form.[303] Bert Combs and the other litigators stayed in the background, keeping a close eye on the legislative proceedings.

The Education Reform Act of 1990 will require monitoring and fine tuning in the years to come. Lawyers will be called upon to "fix the machine if it's still wobbly [or if] it ain't runnin' right."[304] The Rose success has certainly made litigation a more appealing option. Ted Lavit foresees poor districts "going back to the well" before the end of the century.[305] Whether Kentucky

is in for a flood of lawsuits is yet to be seen;[306] many want to give the Act a chance to work.[307] The General Assembly may be able to prevent new lawsuits by adequately funding the system and pointing to signs of progress.

CONCLUSION

The impact of the Kentucky case was "like the dropping of an acorn into a deep pool of mountain water."[308] Lawyers and educators joined together and made a wave that rippled across the state and nation. With the passage of the Education Reform Act of 1990, Kentucky began to cultivate its future and fulfill Jesse Stuart's dream.

For lawyers interested in school reform issues, the Kentucky case teaches some valuable lessons. First, a good litigation strategy is not enough; lawyers must orchestrate a union of political, social and legal forces in support of their cause. For this reason, it is helpful to have a lawyer with political connections and stature on the litigation team. School reform advocates can use the media and concerned citizens' groups to generate grassroots support. The "Robin Hood" fear must be put to rest as early as possible; judges, legislators and voters must be convinced that school reform is a win-win proposition. One way to encourage this perception is to emphasize comprehensive reform and accountability. Most citizens are willing to pay higher taxes for education if they believe their money is being spent wisely.

Since school reform litigation is expensive, it is important to find creative ways to control costs. The Kentucky case was largely a pro bono effort. Bert Combs and his team used a minimalist approach to discovery and kept the case simple and focused. They relied heavily on school finance experts who

donated their time or worked for a reduced rate. By following the Kentucky example, school reform advocates can survive years of litigation without succumbing to obstructive tactics designed to financially break them.

A victory in court means nothing unless it is followed by an acceptable legislative remedy. In Kentucky, a sweeping reform package was passed within a year of the high court's decision. By sowing the seeds for public support and carefully monitoring the legislative process, the litigators helped create an atmosphere conducive to bold action.

The final moral of the Kentucky story is that lawyers do not have to be litigators to advance the cause of education reform. Lawyers can work with educators and citizens' groups, helping them to analyze problems and propose solutions. They can use their advocacy skills to lobby legislators and other public officials. Lawyers who hold elective office can demonstrate responsible leadership and push for the enactment of reform legislation. Finally, as public citizens, lawyers can work to persuade others of the value of education and the justice of equal opportunity.

ENDNOTES

1.J. Stuart, The Thread That Runs So True 304 (2d ed. 1974).

2.T. Clark, Foreword to J. Stuart, The Thread That Runs So True at ix-x (2d ed. 1974).

3.See generally, J. Stuart, The Thread That Runs So True (2d ed. 1974).

4.Id. at 227.

5.Louisville Courier-Journal, June 8, 1989, at A1, col. 4 (data source: Kentucky Dep't of Educ.).

6.Brief for Appellees at 1, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989) (No. 88-SC-804-TG); see also Rose, 790 S.W.2d at 197.

7.For example, in 1984, Kentucky was ranked 43rd in the nation in per pupil expenditures and 1st in functional illiteracy. Brief for Appellees at 1-2; see also Rose, 790 S.W.2d at 197; R. Sexton, New Hope for Better Schools (1988) (speech published by The Prichard Committee for Academic Excellence, Lexington, KY).

8.Kentucky children often sold candy door-to-door in order to raise funds for basic school supplies while well-connected homeowners paid little or no property taxes. See Cheating Our Children, Lexington Herald-Leader, Jan. 1990, at 6 (special series reprint). School boards and superintendents handed out jobs to relatives and political allies and intimidated employees who spoke out against the system. See id. at 14-24.

9.Council for Better Educ. v. Wilkinson, No. 85-CI-1759, slip op. at 10 (Franklin Cir. Ct. May 31, 1988), aff'd sub nom. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989). For a detailed look at school financing data by district, see Louisville Courier-Journal, June 8, 1989, at A12, col. 5 (data source: Kentucky Dep't of Educ.).

10.See Rose, 790 S.W.2d at 197; Brief for Appellees at 3-5.

11.See Brief for Appellees at 3-5.

12.No Kentucky school district is "wealthy" by national standards. The terms "wealthy" and "rich" are used in this paper for intrastate comparisons only.

13.Remarks by Prof. Kern Alexander, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991).

14.See Rose, 790 S.W.2d at 197; Brief for Appellees at 5-8.

15.Ky. Const. § 183.

16.Rose, 790 S.W.2d at 215.

17.See id. at 212-15.

18.Interview with former Gov. Bert T. Combs, lead counsel for plaintiffs, in Lexington, KY (Nov. 8, 1990).

19.Kentucky Education Reform Act of 1990, ch. 476, 1990 Ky. Rev. Stat. & R. Serv. 1140 (Baldwin) (codified as amended at Ky. Rev. Stat. Ann. §§ 156-63 and scattered sections (Michie/Bobbs-Merrill Supp. 1990)). The Act is summarized in A Guide to the Kentucky Education Reform Act of 1990 (available from the Kentucky Legislative Research Commission, Frankfort, KY).

20.See ch. 476, §§ 4-7, 10.

21.See ch. 476, § 14.

22.See ch. 476, § 16.

23.See, e.g., ch. 476, § 71 (person with relative employed by school district is ineligible for election to school board); § 78 (relatives of principal cannot be employed in principal's school); § 79 (school district employees prohibited from taking part in school board campaigns).

24.See ch. 476, §§ 94-97.

25.See ch. 476, § 104 (property to be assessed at 100 percent fair cash value); § 105 (required minimum local property tax effort); § 107 (additional local revenues matched by state on sliding scale basis until ceiling is reached). As a result of the equalizing effect of these provisions and the guaranteed funding level provided by §§ 94-97, every school district in Kentucky will spend more than $3000 per pupil in 1991-92 (compared to only 27/177 districts that spent that much in 1989-90). Remarks by Sen. Michael Moloney, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991).

26.Remarks by former Gov. Bert T. Combs, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991).

27.It is beyond the scope of this case study to examine specific reasons for failure in other states. Instead, this case study focuses on the reasons why the Kentucky case was so successful. Inconsistencies in litigation outcomes cannot be explained by analysis of state constitutional provisions alone. See, e.g., Note, To Render Them Safe: The Analysis of State Constitutional

Provisions in Public School Finance Reform Litigation, 75 Va. L. Rev. 1639, 1646, 1661-70 (1989) (survey of school finance decisions from twenty-four states indicates that Kentucky holding based on education clause is exception to the rule); Thro, The Third Wave: The Impact of the Montana, Kentucky and Texas Decisions on the Future of Public School Finance Reform Litigation, 19 J. Law & Educ. 219, 250 (1990) ("distinctions between the education clauses . . . have been meaningless [in the past]"). Victory in state court is no guarantee that adequate school finance remedies will be enacted by the legislature. See Note, Unfulfilled Promises: School Finance Remedies and State Courts, 104 Harv. L. Rev. 1072 (1991) (failure in other states attributed to "legislative inertia and unwarranted judicial deference to the political branches in the remedial phase").

28.Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 196 (Ky. 1989).

29.Id. at 194 (citing Act of March 15, 1930, ch. 36, 1930 Ky. Acts).

30.See Talbott v. Kentucky State Bd. of Educ., 244 Ky. 826, 52 S.W.2d 727 (1932) (state funds must be apportioned on per capita basis).

31.See Rose, 790 S.W.2d at 194 (Ky. Const. § 186 amended in 1941, 1944, and 1952).

32.See id. at 194, 196 (referring to Minimum Foundation Program, ch. 214, 1954 Ky. Acts). The Minimum Foundation Program is described in more detail in Brief for Appellees at 13-14, Rose (No. 88-SC-804-TG).

33.See Rose, 790 S.W.2d at 194 (statewide median assessment rate was 27% of fair cash value).

34.See Russman v. Luckett, 391 S.W.2d 694 (Ky. 1965) (Ky. Const. § 172 mandates 100% fair cash value property assessments).

35.Rose, 790 S.W.2d at 195 (referring to House Bill 1, ch. 2, 1965 Ky. Acts).

36.See id. at 195-96 (referring to Power Equalization Program, ch. 93, 1976 Ky. Acts); Interview with Theodore H. Lavit, assistant counsel for plaintiffs, in Lebanon, KY (Nov. 5, 1990). The Power Equalization Program is described in more detail in Brief for Appellees at 14-16.

37.Rose, 790 S.W.2d at 195-96 (referring to House Bill 44, ch. 25, 1979 Ky. Acts).

38.Id. at 196.

39.R. Sexton, New Hope for Better Schools (1988) (quoting historian Thomas D. Clark).

40.See Combs interview (Nov. 8, 1990); Interview with Dr. Robert F. Sexton, executive director of the Prichard Committee for Academic Excellence, in Lexington, KY (Nov. 7, 1990).

41.The idea was considered by Arnold Guess, Kern Alexander, Theodore Lavit and others who would later be involved in the Rose litigation. Telephone interview with Prof. Kern Alexander, consultant for plaintiffs (Feb. 22, 1991); Lavit interview (Nov. 5, 1990).

42.Theodore Lavit, an attorney on the Rose litigation team, filed a lawsuit in 1972 challenging the way the federal government distributed entitlement funds for education to the states. He argued that the federal funding formula violated the Fourteenth Amendment by discriminating against children in poor states like Kentucky. Numerous states filed amicus curiae briefs in support. The United States District Court for the Western District of Kentucky dismissed the case after the Supreme Court, in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), held that education was not a fundamental right under the United States Constitution. See Downs v. Marland, No. 7396-B (W.D. Ky. filed Sept. 11, 1972) (case dismissed); Letter from Theodore H. Lavit to Alex Eversole (Sept. 11, 1984); Lavit interview (Nov. 5, 1990). Lavit was assisted by Arnold Guess, Kern Alexander, and Ray Corns--three people who would play key roles in the Rose case. See Lavit letter (Sept. 11, 1984); Lavit interview (Nov. 5, 1990).

43.Alexander interview (Feb. 22, 1991).

44.Id.

45.Arnold Guess had worked in various capacities for the Kentucky Department of Education since 1959. Deposition of Arnold Guess at 4-5 (Mar. 6, 1987). He was highly regarded as a devoted educator, school finance expert and entrepreneur. Alexander interview (Feb. 22, 1991). Prior to entering the Department, Guess had been a teacher, principal and county superintendent. Deposition of Arnold Guess at 4
(Mar. 6, 1987).

46.Remarks by former Gov. Bert T. Combs, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991).

47.Id.

48.Guess was aware of school finance cases from other states and had worked on funding issues for much of his career. From 1982-83, he co-chaired the Superintendent's Commission for State

School Finance. This commission produced a report entitled Equitable Financing of Public Schools (1983) that detailed the inequities and inadequacies of Kentucky's school finance system and made a series of recommendations (which the legislature ignored). Guess also served on the steering committee for a study made by the National Educational Finance Project for the Kentucky Department of Education entitled Financing the Public Schools of Kentucky (1973). Kern Alexander played a major role in conducting both studies. See Alexander interview (Feb. 22, 1991).

49.Memorandum from Arnold Guess to Selected School Superintendents (April 12, 1984). The two-page memorandum/ invitation that Guess sent to the superintendents cited favorable precedents in Arkansas and West Virginia and concluded that "all the remedies have been exhausted [in Kentucky] except testing the question before our state courts." Id. Before sending the memorandum, Guess consulted with state Sen. Michael Moloney, Chairman of the Senate Appropriations Committee. Moloney did not like the idea of a lawsuit and asked that the General Assembly be given a chance to address the issue. No legislative action was taken, so Guess scheduled the meeting. Barwick, A Chronology of The Kentucky Case, 15 J. Educ. Fin. 136 (1989).

50.Barwick, A Chronology of the Kentucky Case, 15 J. Educ. Fin. 136, 139 (1989).

51.Virginia Tech professors Richard Salmon and David Alexander replaced Prof. Kern Alexander, who was unable to attend the first meeting. Interview with Jack Moreland, President of the Council for Better Education, in Dayton, KY (Nov. 8, 1990).

52.See id.; School Superintendent Tells Administrators to Improve Image, UPI, Kentucky region, May 24, 1984.

53.School Superintendent Tells Administrators to Improve Image, UPI, Kentucky region, May 24, 1984.

54.See Kentucky News Briefs, UPI, Kentucky region, May 25, 1984.

55.See Education Chief, Lawmakers Balk at Proposed Suit over School Funding, UPI, Kentucky region, July 9, 1984.

56.Alexander interview (Feb. 22, 1991).

57.Education Chief, Lawmakers Balk at Proposed Suit over School Funding, UPI, Kentucky region, July 9, 1984.

58.Moreland interview (Nov. 8, 1990).

59.Id.

60.Id.

61.Alexander interview (Feb. 22 1991).

62.Roser, Still Battling the Barriers to Progress, Lexington Herald-Leader, Aug. 7, 1988, at A1 (biographical article).

63.See id.; Combs interview (Nov. 8, 1990).

64.Remarks by former Gov. Bert T. Combs, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991); Barwick, A Chronology of The Kentucky Case, 15 J. Educ. Fin. 136, 139 (1989).

65.Remarks by former Gov. Bert T. Combs, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991). Bert Combs jokes: "Being in politics in Kentucky is like joining the Mafia--you can't get out. People keep reminding you of the great favors they did through the years, and how you should return those favors." Id.

66.Combs interview (Nov. 8, 1990).

67.Id.

68.Remarks by former Gov. Bert T. Combs, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991).

69.Id.

70.Combs interview (Nov. 8, 1990).

71.Lavit interview (Nov. 5, 1990).

72.See, e.g., Louisville Times, Dec. 4, 1984, at A5.

73.Combs interview (Nov. 8, 1990).

74.Moreland interview (Nov. 8, 1990).

75.See Deposition and Resume of Kern Alexander (June 23, 1987); Alexander interview (Feb. 22, 1991); Lavit interview (Nov. 5, 1990).

76.Lavit interview (Nov. 5, 1990); Alexander interview (Feb. 22, 1991).

77.See supra note 42.

78.Lavit interview (Nov. 5, 1990).

79.Interview with Prof. Thomas Lewis, assistant counsel for plaintiffs, in Lexington, KY (Nov. 5, 1990).

80.Interview with Debra H. Dawahare, co-counsel for plaintiffs, in Lexington, KY (Nov. 7, 1990).

81.Id.

82.See Alexander interview (Feb. 22, 1991); Lavit interview (Nov. 5, 1990); Lewis interview (Nov. 5, 1990). The complaint is summarized infra text accompanying notes 103-10.

83.Dawahare interview (Nov. 7, 1990).

84.Id.; see also Lavit interview (Nov. 5, 1990).

85.See Memorandum from Council for Better Education Steering Committee to Members (April 25, 1985); Louisville Courier-Journal, May 9, 1985, at B1; Lexington Herald-Leader, May 10, 1985, at B2.

86.Minutes of Council for Better Education Board of Directors Meeting (May 8, 1985).

87.Combs interview (Nov. 8, 1990).

88.See id.; Dawahare interview (Nov. 7, 1990).

89.See School Superintendent Tells Administrators to Improve Image, UPI, Kentucky region, May 24, 1984; Lavit interview (Nov. 5, 1990).

90.See Letter from Attorneys to Arnold Guess (June 5, 1985).

91.See id.

92.See Opinion of Attorney General 85-100 (July 2, 1985); Lexington Herald-Leader, July 6, 1985, at B2.

93.See Lavit interview (Nov. 5, 1990).

94.See Moreland interview (Nov. 8, 1990); Lavit interview (Nov. 5, 1990).

95.See, e.g., Lexington Herald-Leader, June 27, 1985, at B1 (one legislator predicted that the summer would turn out to be "a watershed moment in the history of education in Kentucky").

96.See Reaction to Session Enthusiastic; Bill Drafting Gets Under Way, UPI, Kentucky region, June 28, 1985; Lexington Herald-Leader, June 27, 1985, at B1. The reform package raised teacher salaries, reduced elementary school class sizes, expanded

programs and increased funding for poor districts. See Gov. Martha Layne Collins, Education Improvement Program: An Overview (1985).

97.See Lavit interview (Nov. 5, 1990).

98.See Moreland interview (Nov. 8, 1990).

99.Lavit interview (Nov. 5, 1990).

100.Letter from Theodore H. Lavit to Frank Hatfield (Aug. 28, 1985).

101.Id.

102.Complaint, Council for Better Educ. v. Collins (No. 85-CI-1759) (filed Nov. 20, 1985 in Franklin Cir. Ct.); see also Lexington Herald-Leader, Nov. 21, 1985, at A1; Lexington Herald-Leader, Nov. 22, 1985, at A1.

103.See Combs interview (Nov. 8, 1990).

104.Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 190 (Ky. 1989).

105.Id.

106.Remarks by former Gov. Bert T. Combs, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991).

107.Amended Complaint at 19, Council for Better Educ. v. Collins (No. 85-CI-1759) (filed June 11, 1986 in Franklin Cir. Ct.).

108.Ky. Const. § 183.

109.Amended Complaint at 19.

110.Id. at 19-20.

111.Lexington Herald-Leader, Jan. 18, 1986, at B1 (suit described as "particularly distasteful"). See also Lexington Herald-Leader, Jan. 16, 1986, at B3 (senators "very irate" over lawsuit that "stinks" and spreads "cancer on the society of Kentucky"); Kentucky Legislative Briefs, UPI, Kentucky region, Jan. 14, 1986 (chairman of Senate Education Committee attacks plaintiffs).

112.See S. 102, Ky. Gen. Assembly, Regular Sess. (1986); Lexington Herald-Leader, Jan. 18, 1986, at B1 (bill passed 34-3).

113.See Louisville Courier-Journal, Jan. 19, 1986, at B8; Kentucky Legislative Briefs, UPI, Kentucky region, Jan. 14, 1986.

114.See Lexington Herald-Leader, Feb. 9, 1986, at A1; Lexington Herald-Leader, June 3, 1986, at B2; Moreland interview (Nov. 8, 1990).

115.Prof. Thomas Lewis argues that it is unusual and wrong for a legislature to have to go out and hire a private attorney to represent them in a lawsuit of this magnitude. He favors the creation of a new solicitor general's office or a law requiring the attorney general to defend. Lewis interview (Nov. 5, 1990).

116.See Alexander interview (Feb. 22, 1991).

117.See Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 191 (Ky. 1989).

118.Dawahare interview (Nov. 7, 1990).

119.See id.; Deposition of Kern Alexander (June 23, 1987); Deposition of Arnold Guess (March 6, 1987).

120.See Dawahare interview (Nov. 7, 1990); Lavit interview (Nov. 5, 1990).

121.See Dawahare interview (Nov. 7, 1990).

122.See Remarks of former Gov. Bert T. Combs, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991) (facts were "almost a foregone conclusion"); Combs interview (Nov. 8, 1990) ("there was very little dispute about the factual situation and the evidence was clear--crystal clear").

123.See Brief for Appellants at 13, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989) (No. 88-SC-804-TG).

124.See id. at 9; Dawahare interview (Nov. 7, 1990).

125.Interview with Judge Ray Corns, trial judge, in Frankfort, KY (Nov. 6, 1990).

126.See K. Alexander, R. Corns & W. McCann, Public School Law (1969); Alexander interview (Feb. 22, 1991).

127.See Corns interview (Nov. 6, 1990).

128.See id.; Combs interview (Nov. 8, 1990); Sexton interview (Nov. 7, 1990) (the other Franklin Circuit Court judge was a former associate in education advocate Ed Prichard's law firm); Lexington Herald-Leader, Feb. 14, 1987, at B2 (Judge Corns expected his prior experience to be helpful in managing "computations and numbers" of complex school finance case); Lexington Herald-Leader, Aug. 2, 1987, at E1 ("[r]egardless of

how the judge rules, the case appears destined for the Kentucky Supreme Court"); Alexander interview II (Apr. 16, 1991).

129.Dawahare interview (Nov. 7, 1990).

130.Brief for Appellants at 9; Lavit interview (Nov. 5, 1990).

131.See Challenge to State School Funding Goes to Court, Lexington Herald-Leader, Aug. 5, 1987.

132.See Brief for Appellants at 13-31, 50-61.

133.Lavit interview (Nov. 5, 1990).

134.See Dawahare interview (Nov. 7, 1990); Challenge to State School Funding Goes to Court, Lexington Herald-Leader, Aug. 5, 1987.

135.See Brief for Appellants at 31-38, 42-50.

136.See id. at 35-38.

137.Dawahare interview (Nov. 7, 1990).

138.Id.

139.Id.

140.Ky. Const. § 183.

141.Brief for Appellants at 47, 56.

142.See Lexington Herald-Leader, Apr. 19, 1988, at B1; Alexander interview II (Apr. 16, 1991) (McDonald ran for lieutenant governor and was soundly defeated).

143.See Council for Better Educ. v. Wilkinson, No. 85-CI-1759, slip op. at 2 (Franklin Cir. Ct. May 31, 1988), aff'd sub nom. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Alexander interview II (Apr. 16, 1991).

144.See Alexander interview (Feb. 22, 1991); Lexington Herald-Leader, May 29, 1988, at A1.

145.See Brief of Amici Curiae Prichard Committee for Academic Excellence and Kentuckians for the Commonwealth, Council for Better Educ., Inc. v. Collins (No. 85-CI-1759) (filed Mar. 9, 1988 in Franklin Cir. Ct.). The role of the Prichard Committee in Kentucky education reform is discussed infra text accompanying notes 249-58.

146.Brief of Amici Curiae at 14. This statement suggests a more comprehensive remedy than that originally sought by the plaintiffs (equalization) and foreshadows the ultimate holding of the court.

147.Louisville Courier-Journal, Mar. 18, 1988, at A1.

148.See id. (Gov. Wilkinson rejects idea of more money for schools; proposes reduction in some education programs instead).

149.Council for Better Educ. v. Wilkinson, No. 85-CI-1759, slip op. at 16 (Franklin Cir. Ct. May 31, 1988). This opinion was the first of three that the trial court would issue. All three opinions are described in Rose, 790 S.W.2d at 191-93.

150.Id. at 10.

151.Id. at 11. The court acknowledged the waste and mismanagement problem, but refused to recognize it as a substantial contributor to the financial woes of the poor districts. See id. at 8.

152.Id. at 14. Since education was a fundamental right, the state had the duty to provide "substantially equal educational opportunities" to all students and could not discriminate against them on the basis of residence. Such discrimination violated Ky. Const. § 183 and the equal protection guarantees of Ky. Const. §§ 1 and 3. Id. at 14-15.

153.Id. at 12-13 (quoting Ky. Const. § 183). In this first opinion, "efficient" was defined to mean "adequate, uniform, and unitary." Id. at 13.

154.Id. at 17-18.

155.See Judge Says Kentucky School Funding System is Unconstitutional, UPI, Kentucky region, May 31, 1988.

156.See Lexington Herald-Leader, June 1, 1988, at A1.

157.Id.

158.Id. (quoting Judge Corns).

159.Id. (quoting Wade Mountz, chairman of the Prichard Committee for Academic Excellence).

160.Lexington Herald-Leader, June 3, 1988, at A1 (the leadership thought that Judge Corns had overstepped the bounds of judicial authority by seeking to legislate from the bench).

161.Combs interview (Nov. 8, 1990).

162.See id.

163.Alexander interview (Feb. 22, 1991).

164.See Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 192 (Ky. 1989). The order appointing the committee clarified some of the ambiguities of the first ruling. The court emphasized that redistribution of current funds from rich districts to poor districts would be both inappropriate and inadequate (inferring that additional revenues were necessary). See id.; Council for Better Educ. v. Wilkinson, No. 85-CI-1759 (Franklin Cir. Ct. June 7, 1988) (supplemental order). The supreme court ultimately ruled that Judge Corns' appointment of an advisory committee was an improper delegation of judicial authority. Rose, 790 S.W.2d at 215.

165.See Report by the Select Committee to Judge Ray Corns, Franklin Circuit Court, Kentucky (Sept. 15, 1988) (reprinted in Constitutional Intent: "System," "Common," and "Efficient" as Terms of Art, 15 J. Educ. Fin. 142 (1989)).

166.Corns interview (Nov. 6, 1990); see also Lexington Herald-Leader, July 6, 1988, at A1 (account of first public hearing); Lexington Herald-Leader, July 7, 1988, at B1 (account of second public hearing, attended by Bert Combs and Gov. Wilkinson).

167.See Report by the Select Committee to Judge Ray Corns, Franklin Circuit Court, Kentucky (Sept. 15, 1988) (reprinted in Constitutional Intent: "System," "Common," and "Efficient" as Terms of Art, 15 J. Educ. Fin. 142 (1989)). The report also interpreted the constitutional terms "system," "common," and "efficient" (Ky. Const. § 183) and discussed the concepts of adequacy and equity in the context of Kentucky schools. See id.

168.See Council for Better Educ. v. Wilkinson, No. 85-CI-1759, slip op. at 2-3 (Franklin Cir. Ct. Oct. 14, 1988), aff'd sub nom. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989). The principles were modified slightly by the Kentucky Supreme Court in Rose, 790 S.W.2d at 212-13, and are listed infra text accompanying note 183.

169.The court defined an "efficient system of common schools" as "a tax supported, coordinated organization, which provides a free, adequate education to all students throughout the state, regardless of geographical location or local fiscal resources." Council for Better Educ. v. Wilkinson, No. 85-CI-1759, slip op. at 4 (Franklin Cir. Ct. Oct. 14, 1988). It set forth seven curriculum goals necessary for an "adequate" education:

> [Schools must provide] (i) sufficient oral and written

communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id. at 4-5 (adopted by the Kentucky Supreme Court in Rose, 790 S.W.2d at 212). An "adequate" school system must be carefully supervised and provide enough teachers, textbooks and facilities to do the job. Id. at 5.

170. Id. at 8.

171. Id. at 11.

172. Id. at 8-9, 11-13. The court thought that redistribution of funds from rich districts to poor districts would have "disastrous effects" by "creating uniform mediocrity." Id. at 6.

Moreover, it rejected the possibility of a reallocation of funds within the general budget because such action would "crippl[e] other vital functions of state government." Id. at 12. "The [c]ourt [saw] no viable alternative except additional new funds which appear[ed] to be available only by the imposition of new taxes." Id. at 12-13. This strong "new taxes" suggestion was the most controversial element of the opinion. See Lexington Herald-Leader, Oct. 15, 1988, at A1; Louisville Courier-Journal, Oct. 15, 1988, at A1.

173.Council for Better Educ. v. Wilkinson, No. 85-CI-1759, slip op. at 14 (Franklin Cir. Ct. Oct. 14, 1988). Judge Corns also left open the possibility of a federal court appeal by ruling that Kentucky's school system violated the due process and equal protection clauses of U.S. Const. amend XIV. Id. at 8; see also Lexington Herald-Leader, Oct. 17, 1988, at B1 (judge "wanted [poor districts] to have the option of a federal appeal if they los[t] in the state's highest court").

174.Lexington Herald-Leader, Oct. 16, 1988, at B1.

175.Id.

176.See Brief for Appellants at 13, Rose (No. 88-SC-804-TG).

177.See Brief for Appellants; Lexington Herald-Leader, Dec. 8, 1988, at B1; Louisville Courier-Journal, Dec. 8, 1988, at A1.

178.Louisville Courier-Journal, Dec. 8, 1988, at A1; see also Brief for Appellees; Lexington Herald-Leader, Dec. 8, 1988, at B1.

179.See Lexington Herald-Leader, Dec. 8, 1988, at B1; Louisville Courier-Journal, Dec. 8, 1988, at A1.

180.Lexington Herald-Leader, June 7, 1989, at A1.

181.Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989). In Bert Combs judgment, "the Supreme Court didn't go any farther than Judge Corns did"--it just used more "purple prose" and "flamboyant adjectives" in its opinion. Combs interview (Nov. 8, 1990). The Rose decision is compared to school finance decisions in other states in the articles cited supra note 27.

182.Id. The June 8, 1989 opinion was slightly modified on Sept. 28, 1989 at the request of Bert Combs and legislative leaders (the reported version incorporates this modification). The court clarified the role of the General Assembly in monitoring the school system and ruled that local districts could exceed a uniform tax rate set by the state. See id. at 186, 211-212;

Lexington Herald-Leader, Sept. 29, 1989, at A1; Lexington Herald-Leader, July 19, 1989, at B2.

183. Id. at 212-13. These defining characteristics of an "efficient" system were derived from constitutional debates, Kentucky precedent, precedent from other states (particularly West Virginia), and expert opinion. See id. at 205-211. The court left the decision of how best to achieve an efficient system to the legislature. Id. at 212. However, the court held that if the General Assembly chose to partly finance the new system with local property taxes, they must ensure that all property is assessed at 100% fair market value and that a uniform tax rate is established. Id. at 216.

184. Id. at 215. The court did not declare any specific statute unconstitutional on its face, but rather declared the whole statutory system unconstitutional. The General Assembly was given the option of reenacting old statutes as part of a new "efficient" system. Id.

185. Id. at 199-202. Local boards had the statutory power to do "all things necessary" to promote education. Id. at 200. No statute prohibited them from suing the state. Id. Even if this were not the case, the Council for Better Education had the authority to sue because it was a legally separate entity unconnected with the state. Id. at 201. Both the Council and the local boards had standing to sue because their duty to promote education gave them a "real and substantial interest in the subject matter of the litigation." Id. at 202. The court also held that the plaintiffs failure to create a proper class action did not effect its declaratory judgment. Id.

186. Id. at 203-05. This holding was based on precedent from other states and "common sense" (waste of time to require service on every member of the General Assembly). The two legislative leaders were named in a representational capacity and had the power to defend the constitutionality of the General Assembly's acts. Id.

187. Id. at 214-215. Neither the trial court nor the Supreme Court violated the separation of powers doctrine in their actual judgments; both courts refrained from directing the legislature to enact "specific legislation." Id. at 214.

188. To give the General Assembly time to comply, the court withheld the finality of its decision until ninety days after the adjournment of the 1990 regular legislative session. Id. at 216. One concurring justice thought that the majority opinion granted a right without a remedy and that the trial court should have been directed to issue an order requiring the Governor to call a special session and requiring the General Assembly to pass

legislation that met the constitutional mandate. Id. at 216-218 (Gant, J., concurring).

189.Remarks by former Gov. Bert T. Combs, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991).

190.Alexander interview (Feb. 22, 1991).

191.Rose, 790 S.W.2d at 225, 227 (Leibson, J., dissenting). Justice Leibson was concerned that the court was "caught up in [the] rush of judicial activism" practiced by courts in other states confronted with the school finance inequity problem. Id. at 228. In its effort to provide the General Assembly with an "unprecedented opportunity" to reform Kentucky's educational system, the court violated the separation of powers doctrine and opened up a "Pandora's box" of horribles. Id. at 224, 228-29.

192.See id. at 222-23 (Vance, J., dissenting); id. at 223 (Leibson, J., dissenting).

193.Telephone interview with William Scent, counsel for defendants (Mar. 4, 1991).

194.Lexington Herald-Leader, June 7, 1989, at A1.

195.Reaction to the State Supreme Court's Education Ruling, Lexington Herald-Leader, June 9, 1989.

196.Id.

197.Dawahare interview (Nov. 7, 1990).

198.Remarks by former Gov. Bert T. Combs, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991).

199.Combs interview (Nov. 8, 1990).

200.Id. Experiences in other states justified these concerns. See Note, Unfulfilled Promises: School Finance Remedies and State Courts, 104 Harv. L. Rev. 1072 (1991).

201.Alexander interview (Feb. 22, 1991).

202.Scent interview (Mar. 4, 1991).

203.Id.

204.See Combs interview (Nov. 8, 1990).

205.Kentucky Legislative Research Commission, A Guide to the Kentucky Education Reform Act of 1990, at v, 4 (1990).

206.See id. at vii-ix, 4. The three committees were composed of Task Force members and members from the House and Senate education committees (who served in an ex-officio, non-voting capacity). See id. at vii; Interview with Sandra Deaton, member of Task Force staff, in Frankfort, KY (Nov. 6, 1990). The consultants chosen by the Task Force did an "excellent" job. Sexton interview (Nov. 7, 1990).

207.Deaton interview (Nov. 6, 1990).

208.See Kentucky News Briefs, UPI, Kentucky region, Sept. 21, 1989.

209.See Combs interview (Nov. 8, 1990); Deaton interview (Nov. 6, 1990); Dawahare interview (Nov. 7, 1990).

210.Dawahare interview (Nov. 7, 1990).

211.See Lexington Herald-Leader, July 28, 1989, at A14.

212.Combs interview (Nov. 8, 1990); see also Alexander interview (Feb. 22, 1991) (Combs' "presence was felt").

213.See Lexington Herald-Leader, Dec. 6, 1989, at A8; Lexington Herald-Leader, Dec. 19, 1989, at B2; Moreland interview (Nov. 8, 1990); Alexander interview (Feb. 22, 1991). The document focused on the three essential deficiencies that the guidelines were meant to address: inadequate funding, unequal funding, and lack of uniform educational opportunities. See Council for Better Education, Clarification of Judicial Guidelines (Dec. 18, 1989).

214.See Moreland interview (Nov. 8, 1990). The refocusing effort showed that the Council was not going to "roll over" and would do everything it could to ensure that the General Assembly complied with the court's mandate. Alexander interview (Feb. 22, 1991). The increased activity of the finance committee may have just been coincidental. See Moreland interview (Nov. 8, 1990); Deaton interview (Nov. 6, 1990).

215.See Combs interview (Nov. 8, 1990); State Developments: Kentucky, Bureau of Nat. Affairs Daily Report for Executives, Jan. 19, 1990; Lexington Herald-Leader, Jan. 22, 1990, at A1; infra note 282 and accompanying text.

216.See Lexington Herald-Leader, Jan. 21, 1990, at C1; Lexington Herald-Leader, Jan. 22, 1990, at A1.

217.Lawmakers Extend Olive Branch to Governor, UPI, Kentucky region, Feb. 14, 1990. The relationship between Gov. Wilkinson and the legislature had been "lousy" throughout most of his term. Sexton interview (Nov. 7, 1990).

218.See Lawmakers to Consider Education Reform, Tax Bill as Package, UPI, Kentucky region, Mar. 7, 1990; Kentucky Legislative Research Commission, A Guide to the Kentucky Education Reform Act of 1990, at 4 (1990).

219.See House Passes Education Reform Package, UPI, Kentucky region, Mar. 21, 1990 (58-42 vote); Senate Passes Education Reform, Tax Increase, UPI, Kentucky region, Mar. 28, 1990 (30-8 vote); Governor Signs Education Reform Bill into Law, UPI, Kentucky region, Apr. 11, 1990; A Guide to the Kentucky Education Reform Act of 1990, at 4.

220.Telephone interview with Dr. David Hornbeck, consultant to the Committee on Curriculum (Mar. 1, 1991). The Task Force's power will likely be felt in future sessions of the General Assembly, especially if attempts are made to reduce the revenue base enacted in the 1990 Act. According to Sen. Michael Moloney, "Task Force members aren't going to see their work product torn apart. . . . [a proposal to reduce education funding] won't make it out of the Appropriations Committee . . . it will not get fair treatment" (Moloney is chairman of the Senate Appropriations Committee). Remarks by Sen. Michael Moloney, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991).

221.See Remarks by Sen. Michael Moloney, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991).

222.For example, the leadership knew that most members would not support a major tax increase and equalization effort unless something was done about waste, corruption and mismanagement. The leadership also had to make sure that the bill did not penalize rich districts. See id.

223.See Lawmakers in Ky. Approve Landmark School-Reform Bill, Education Week, Apr. 4, 1990 ("House leaders reportedly dangled certain construction projects in front of reluctant House members until their votes were secured").

224.Remarks by Sen. Michael Moloney, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991).

225.Id.

226.Kentucky Education Reform Act of 1990, ch. 476, 1990 Ky. Rev. Stat. & R. Serv. 1140 (Baldwin) (codified as amended at Ky. Rev. Stat. Ann. §§ 156-63 and scattered sections (Michie/Bobbs-Merrill Supp. 1990)). The Act is summarized in A Guide to the Kentucky Education Reform Act of 1990 (available from the Kentucky Legislative Research Commission, Frankfort, KY).

227.See ch. 476, §§ 94-97, 104-05, 107. The new school finance system combines a guaranteed level of per pupil support (weighted for at-risk children), a local effort requirement, and a two tier formula for increasing expenditures above the floor level. Local districts can provide additional revenues of up to 15% of the state guarantee and receive matching funds from the state on a sliding scale basis according to district property wealth. They can increase revenues an additional 30% above this tier one level if district residents consent by referendum. The tier two option is not equalized by the state and functions as a ceiling on spending. Many school districts have received a 25% increase in state funding as a result of this new finance system. See Remarks by Sen. Michael Moloney, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991); Lexington Herald-Leader, Aug. 23, 1990, at B1 (positive impact of funding increase on poor school district); supra note 25.

228.See ch. 476, § 92.

229.See ch. 476, §§ 71, 78-79; supra note 23.

230.See ch. 476, § 14.

231.See ch. 476, § 25.

232.See ch. 476, § 18.

233.See ch. 476, § 16.

234.See America's Toughest Assignment: The Education Crisis (CBS television broadcast, Sept. 6, 1990) (suggests ideas for improving schools and compares Kentucky reform efforts to those in Texas and New Jersey).

235.See ch. 476, §§ 4-7.

236.See ch. 476, § 10.

237.See Moreland interview (Nov. 8, 1990).

238.Id. The Act has attracted nationwide attention and been the subject of much praise. Albert Shanker, president of the American Federation of Teachers, called the Act "the most intelligent state reform plan that's been adopted anywhere in the country." Lexington Herald-Leader, Apr. 22, 1990, at A1 (surveying "rave reviews" from across the United States). National newspapers, magazines, and television networks have covered the story. See, e.g., id. (referring to articles from the New York Times, the Detroit Free Press, and the Dallas Times-Herald); Carroll, Who Foots the Bill?, Newsweek, Fall/Winter 1990, at 81-82 (special education issue); America's Toughest

Assignment: The Education Cri is (CBS television broadcast, Sept. 6, 1990).

239.Remarks by former Gov. Ber T. Combs, Harvard Journal of Legislation Symposium on Schoo Finance Reform (Feb. 9, 1991).

240.Cohen, Transcendental Nons nse and the Functional Approach, 35 Colum. L. Rev. 809, 843 (19 5).

241.Combs interview (Nov. 8, 1 90).

242.Washington Post, Dec. 25, 984, at B7.

243.Id. (quoting Washington Po t board chairwoman Katharine Graham and historian Arthur Sc lesinger, Jr.); Schlesinger, 'Prich': A New Deal Memoir, N w York Review of Books, Mar. 28, 1985, at 21 (memoir with legal and political anecdotes).

244.Washington Post, Dec. 25, 984, at B7.

245.Schlesinger, 'Prich': A N w Deal Memoir, New York Review of Books, Mar. 28, 1985, at 23-24

246.See id. at 24-25; Louisvil e Courier-Journal, Dec. 24, 1984, at A1.

247.Combs interview (Nov. 8, 1 90).

248.Id.

249.See Interview with Cindy H ine, associate executive director of the Prichard Committee for cademic Excellence, in Lexington, KY (Nov. 7, 1990); Prichard Co mittee Perspectives, May 1990, at 8; Education Week, May 11, 198 , at 12, col. 2.

250.Education Week, May 11, 19 8, at 13, col. 1.

251.See Sexton interview (Nov. 7, 1990); Brief of Amici Curiae Prichard Committee for Academi Excellence and Kentuckians for the Commonwealth, Council for etter Educ., Inc. v. Collins (No. 85-CI-1759) (filed Mar. 9, 198 in Franklin Cir. Ct.).

252.See Heine interview (Nov. , 1990); Prichard Committee Perspectives, Feb. 1990, at 4- .

253.See Lexington Herald-Leade , July 25, 1990, at A10.

254.See Governor Will Have an ar on Education Forums, UPI, Kentucky region, Nov. 14, 1984; Thousands of Kentuckians Attend Statewide Forums on Education, UPI, Kentucky region, Nov. 15, 1984; Lexington Herald-Leader, Nov. 16, 1984, at A1.

255.Lexington Herald-Leader, Nov. 16, 1984, at A1.

256.See Education Week, May 11, 1988, at 12, col. 5; Prichard Committee for Academic Excellence, The Path to a Larger Life (1985).

257.See Combs interview (Nov. 8, 1990).

258.Education Week, May 11, 1988, at 12, col. 5.

259.Heine interview (Nov. 7, 1990).

260.See Education Week, May 11, 1988, at 12, col. 4.

261.See Lexington Herald-Leader, Nov. 16, 1984, at A1.

262.See, e.g., Lexington Herald-Leader, July 30, 1984, at C2 (quoting a press release distributed to newspapers across the state by the Council for Better Education).

263.See, e.g., Lexington Herald-Leader, Nov. 16, 1984, at A1; Thousands of Kentuckians Attend Statewide Forums on Education, UPI, Kentucky region, Nov. 15, 1984.

264.See, e.g., newspaper articles cited supra notes 131, 155-56, 166, 172, 177.

265.See, e.g., Lexington Herald-Leader, Oct. 18, 1988, at A10 (editorial arguing that "Corns' solid decision puts legislature, governor on spot"); Scared Leaders Are No Leaders at All, Lexington Herald-Leader, July 5, 1988 (editorial from the Frankfort State Journal).

266.Scent interview (Mar. 4, 1991).

267.See, e.g., Louisville Courier-Journal, June 8, 1989; Lexington Herald-Leader, June 9, 1989.

268.Golden Opportunity, Louisville Courier-Journal, June 9, 1989 (editorial).

269.Remarks by Sen. Michael Moloney, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991). Some of the most influential articles appeared in the Lexington Herald-Leader from Nov. 12 through Dec. 15, 1989 and focused on nepotism, school politics and tax fraud. See Cheating Our Children, Lexington Herald-Leader, Jan. 1990 (special series reprint); supra note 8.

270.See Alexander interview (Feb. 22, 1991).

271.See id.; Lavit interview (Nov. 5, 1990).

272.Moreland interview (Nov. 8, 1990).

273.See, e.g., Louisville Times, Dec. 4, 1984, at A5 (Combs offers to represent poor districts); Louisville Courier-Journal, Jan. 19, 1986, at B8 ("Combs calls school-finance suit the best way to settle issue"); Lexington Herald-Leader, Oct. 16, 1988, at B1 (Combs-Scent debate before Council of School Board Attys.).

274.Remarks by former Gov. Bert T. Combs, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991). Political pressures cut both ways. By the time the case reached the supreme court, polls showed that most Kentuckians were willing to pay more taxes for school reform if they could be assured that the money would not be wasted. Id. For a general discussion of political constraints upon state courts, see Note, Unfulfilled Promises: School Finance Remedies and State Courts, 104 Harv. L. Rev. 1072, 1083-85 (1991).

275.Council for Better Educ. v. Wilkinson, No. 85-CI-1759, slip op. at 13 (Franklin Cir. Ct. Oct. 14, 1988), aff'd sub nom. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989).

276.Corns interview (Nov. 6, 1990). After his ruling received state and national attention, Corns' friends convinced him to run for Lt. Governor on an education platform. Id.

277.Combs interview (Nov. 8, 1990).

278.Corns interview (Nov. 6, 1990).

279.Id.

280.See K. Alexander, R. Corns & W. McCann, Public School Law (1969); Alexander interview (Feb. 22, 1991).

281.See supra note 42.

282.See Pipho, Re-Forming Education in Kentucky, Phi Delta Kappan, May 1990, at 662-63 (discussing term limitation and tax politics); State Developments: Kentucky, Bureau of Nat. Affairs Daily Report for Executives, Jan. 19, 1990 (describing tax package); Lexington Herald-Leader, June 9, 1989, at A1 (Wilkinson pledges to "support the necessary revenue measures to pay for [reforms]"); Lexington Herald-Leader, Feb. 23, 1989, at A1 (Combs suggests that Wilkinson could raise taxes and survive); Louisville Courier-Journal, Mar. 18, 1988, at A1 (Wilkinson rejects pleas of more than 15,000 pro-education demonstrators by refusing to support a tax increase).

283.See Dawahare interview (Nov. 7, 1990); Combs interview (Nov. 8, 1990). But see Lavit interview (Nov. 5, 1990) ("[The

legislature wasn't] courageous--the courts took up the rally and made them do it.").

284.See They Earned A's, Louisville Courier-Journal, April 11, 1990 (editorial).

285.Roser, Still Battling the Barriers to Progress, Lexington Herald-Leader, Aug. 7, 1988, at A1.

286.Id.

287.See id.; Combs interview (Nov. 8, 1990).

288.Corns interview (Nov. 6, 1990).

289.Id; see also Lexington Herald-Leader, Oct. 17, 1988, at B1. Other important players in Kentucky school reform knew what it was like to be educated in a poor school district. For example, Gov. Wilkinson attended a high school that had no advanced math, science or foreign language classes. These roots may have influenced his decision to support Judge Corns' ruling. See Lexington Herald-Leader, July 7, 1988, at B1.

290.See Moreland interview (Nov. 8, 1990); Louisville Times, Dec. 4, 1984, at A5 (Kern Alexander says wealthy districts will not be penalized by suit); Challenge to State School Funding Goes to Court, Lexington Herald-Leader, Aug. 5, 1987 (Bert Combs tells trial court that plaintiffs do not wish to penalize rich districts); Corns Stands by His Ruling, UPI, Kentucky region, Oct. 15, 1988 (Combs applauds Judge Corns for prohibiting redistribution); Combs Sees No Peril to Wealthier Schools, Louisville Courier-Journal, June 12, 1989 (Combs says supreme court ruling will not hurt rich districts). The public strongly opposed naked redistribution. See, e.g., Lexington Herald-Leader, July 6, 1988, at A1 (Corns committee told not to "play Robin Hood").

291.See Moreland interview (Nov. 8, 1990).

292.Judge Corns found that redistribution "would have disastrous effects on the entire system" by "creating uniform mediocrity." Council for Better Educ. v. Wilkinson, No. 85-CI-1759, slip op. at 6 (Franklin Cir. Ct. Oct. 14, 1988), aff'd sub nom. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989). The supreme court held that the General Assembly could allow local school districts "to supplement the state system." Rose, 790 S.W.2d at 211-212.

293.Remarks by Sen. Michael Moloney, Harvard Journal of Legislation Symposium on School Finance Reform (Feb. 9, 1991). See also Education Reform Act sections cited supra note 227.

294.See supra text accompanying notes 64-73.

295.See Moreland interview (Nov. 8, 1990) (McDonald told several superintendents that if they filed the lawsuit, "she would own [their] houses"); Alexander interview (Feb. 22, 1991).

296.See Alexander interview (Feb. 22, 1991).

297.See id.

298.Moreland interview (Nov. 8, 1990).

299.See Sexton interview (Nov. 7, 1990); Deaton interview (Nov. 6, 1990).

300.Model Rules of Professional Conduct Preamble ¶ 1 (1983).

301.Model Rules of Professional Conduct Preamble ¶ 5 (1983).

302.Policy decisions were also made by non-lawyer members and education consultants. For this reason, there was the perception that "lawyers [were not really] acting as lawyers" during the legislative phase. Hornbeck interview (Mar. 1, 1991). David Hornbeck, a lawyer and education consultant to the Task Force Curriculum Committee, says that he did not use his legal skills at all. Instead, he used his educational expertise to make policy recommendations. Id. (Hornbeck had been Maryland State Superintendent of Schools for many years). Though creative policy-making does not require a law degree, one cannot ignore the fact that many of the most dedicated school reform advocates (both before and after the lawsuit) were lawyers (e.g., Ed Prichard, Bert Combs, Ray Corns, Ted Lavit, Sen. David Karem, Sen. Michael Moloney, and Rep. Joe Clarke). See Sexton interview (Nov. 7, 1990); Deaton interview (Nov. 6, 1990); They Earned A's, Louisville Courier-Journal, April 11, 1990 (editorial).

303.See Hornbeck interview (Mar. 1, 1991); Deaton interview (Nov. 6, 1990).

304.Lavit interview (Nov. 5, 1990).

305.Id. Though the supreme court denied continuing jurisdiction, it made it easy for poor districts to bring suit again (e.g., by not requiring that all legislators be named). See id; supra notes 185-86 and accompanying text. "Second round challenges" to legislative remedies have occurred in other states. See Note, Unfulfilled Promises: School Finance Remedies and State Courts, 104 Harv. L. Rev. 1072 (1991).

306.Several provisions of the Act are currently under siege. See, e.g., Lexington Herald-Leader, Mar. 27, 1991, at B3 (day-care centers to lobby for repeal of public preschool programs

created by Act); Lexington Herald-Leader, Jan. 5, 1991, at C1 (judge issues restraining order preventing attorney general from removing four school board members who are challenging constitutionality of nepotism provisions); Business First-Louisville, Nov. 5, 1990, at 1 (cable company, represented by Wyatt, Tarrant & Combs, files suit claiming that new local utility tax on cable for school purposes is unconstitutional); Lexington Herald-Leader, July 19, 1990, at A1 (state teachers' union files suit challenging ban on teacher participation in school board campaigns). Litigation testing of the Act has been sharply criticized by lawmakers and the press. See, e.g., Lexington Herald-Leader, July 20, 1990, at A14 (special interest group "vultures" trying to tear the Act apart). Still, Council President Jack Moreland thinks that litigation is "healthy" and will not hurt the new system. He predicts that the Act will create much more work for lawyers in the years to come. See Moreland interview (Nov. 8, 1990).

307. See Moreland interview (Nov. 8, 1990).

308. J. Stuart, The Thread That Runs So True 274 (2d ed. 1974).